IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Respondent, v. BERNIE LEE DURAN, Petitioner.	)	2 CA-CR 2006-0167-PR DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20040612

Honorable Christopher C. Browning, Judge

REVIEW GRANTED; RELIEF DENIED

Harriette P. Levitt — Tucson
Attorney for Petitioner

E S P I N O S A, Judge.

¶1 Petitioner Bernie Duran was charged with three counts of aggravated assault, one count each of endangerment and kidnapping, and two counts of possessing a deadly weapon as a prohibited possessor. He pled guilty pursuant to an agreement to a single count of aggravated assault with a deadly weapon or dangerous instrument, a dangerous offense, and was sentenced to an aggravated prison term of fifteen years. He seeks review of the trial

court's denial of relief on his petition for post-conviction relief, filed pursuant to Rule 32, Ariz. R. Crim. P., 17 A.R.S. We review for an abuse of discretion a trial court's ruling on a post-conviction petition. *State v. Decenzo*, 199 Ariz. 355, ¶ 2, 18 P.3d 149, 150 (App. 2001). We find no abuse of discretion here, although we conclude Duran was not entitled to post-conviction relief for somewhat different reasons than the trial court's. *See State v. Saiers*, 196 Ariz. 20, ¶ 16, 992 P.2d 612, 616 (App. 1999).

¶2 Duran first contends his waiver of rights pursuant to *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531 (2004), was not knowing, intelligent, or voluntary. We disagree. In addition to an express waiver of his right to a jury trial by pleading guilty, the plea agreement provided as follows:

> I further agree to waive my right to all trials. This includes any jury determination of aggravating factors beyond a reasonable doubt. I also agree that the Court, using a standard of preponderance of the evidence, may find the existence of aggravating or mitigating factors which may impact my sentence or disposition. I further agree that the rules of evidence do not apply in the determination of aggravating and mitigating factors.

And, at the change-of-plea hearing, the trial court enumerated at length the rights Duran was waiving by pleading guilty, including his *Blakely* rights, saying: "You would have the right to have the jury determine the existence of any factors that the Court might consider in aggravating or enhancing or increasing any sentence I might ultimately impose for any crime you were convicted of."

¶3 The quoted language thus belies Duran's assertion on review that the trial court "did not separately and specifically advise him regarding the Blakely rights he was waiving." As support for his contention that his waiver of rights was inadequate, Duran relies on this court's decision in *State v. Brown*, 210 Ariz. 534, 115 P.3d 128 (App. 2005), a decision the supreme court subsequently affirmed. *State v. Brown*, 212 Ariz. 225, 129 P.3d 947 (2006). But the defendant in that case did not waive his *Blakely* rights, *id.* ¶ 11; therefore, that case is not applicable to Duran's. And Duran has cited no authority for his assertion that the trial court was required to explain the difference between beyond a reasonable doubt and by a preponderance of the evidence. Because Duran did not argue it below, we do not address his contention that the court failed to tell him a jury would have been required to unanimously determine the existence of aggravating factors. *See State v. Herrera*, 183 Ariz. 642, 648, 905 P.2d 1377, 1383 (App. 1995).

¶4 We reject Duran's argument that his serious mental health problems and his difficulty in hearing and understanding the proceedings rendered the waiver of his *Blakely* rights insufficient. The trial court was well aware of Duran's mental health issues, having ordered him to be evaluated pursuant to Rule 11, Ariz. R. Crim. P., 16A A.R.S., and having heard testimony in the aggravation-mitigation hearing by three psychologists and a physician who had examined Duran and by his former wife, one of the victims of his offense. In addition, although there was evidence that Duran had a hearing impairment, there was no indication at the change-of-plea hearing that he had any difficulty hearing any of the

proceedings. Moreover, the trial court continued the change-of-plea hearing for a couple of days to permit Duran to further discuss the plea agreement provisions with his trial counsel and his daughter. And the court questioned Duran at length about his understanding of the terms of the agreement and his voluntary acceptance of it. Therefore, the trial court did not abuse its discretion in denying relief on this claim.

¶5 Duran also contends the trial court misinterpreted the law applicable to the requirement that the state give a defendant notice of the aggravating circumstances it intends to prove at sentencing. Duran is correct that, in analyzing this claim, the trial court misstated the aggravating circumstances it had found at sentencing. But the court nevertheless properly denied relief on the claim. Because Duran waived his rights under *Blakely*, he also waived whatever right he might have had to notice from the state of any aggravating circumstances it intended to prove. And Duran is incorrect that he had no notice the court might aggravate his sentence based on multiple victims. That argument ignores the express terms of the plea agreement—that he pled guilty to the aggravated assault of three victims.

¶6 Finally, the trial court properly denied relief without conducting an evidentiary hearing on Duran's claim that trial counsel was ineffective in explaining the provisions of the plea agreement to him. Duran points to his daughter's affidavit in which she stated that, although trial counsel had mentioned *Blakely*, she and her father had understood he was giving up a jury trial but not the right "to have a jury help decide his sentence." Duran correctly notes that her affidavit was uncontroverted; what he ignores is that her statements

about his understanding were hearsay and not admissible under any of the exceptions to the hearsay rule. *See* Ariz. R. Evid. 801(c), 803, 17A A.R.S.

¶7 Duran not only failed to submit his own affidavit about his understanding of what counsel had told him, but he also failed to show how he was prejudiced by counsel's explanations, making below only the contradictory statements that he would otherwise not have waived his *Blakely* rights but would instead have "asserted his right to notice of potential aggravating factors before agreeing to waive those rights." Absent a showing of prejudice, a requirement of a claim of ineffective assistance of counsel, *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984); *State v. Nash*, 143 Ariz. 392, 397, 694 P.2d 222, 227 (1985), Duran cannot show the trial court abused its discretion in denying relief on this claim.

¶8 Accordingly, we grant review, but deny relief.

_____
PHILIP G. ESPINOSA, Judge

CONCURRING:

_____
PETER J. ECKERSTROM, Presiding Judge

_____
J. WILLIAM BRAMMER, JR., Judge